

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals with)	
Hearing and Speech Disabilities)	
)	
Structure and Practice of the Video Relay Service)	CG Docket No. 10-51
Program)	
)	
Interstate Telecommunications Relay Services Fund)	
Payment Formula and Fund Size Estimate for the)	
July 2019 Through June 2020 Fund Year)	

To: Secretary, FCC
For: Chief, Consumer and Governmental Affairs Bureau

COMMENTS OF HAMILTON RELAY, INC.

Hamilton Relay, Inc. (“Hamilton”), by its counsel, submits these comments in response to the *Public Notice* (“*Notice*”) issued by the Commission’s Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceedings.¹ In the *Notice*, the Bureau seeks comment on the compensation rates for various forms of interstate Telecommunications Relay Services (“TRS”) for the period beginning July 1, 2019 through June 30, 2020. The proposed TRS compensation rates were submitted by the interstate TRS Fund Administrator (“Administrator”) in its May 1, 2019 filing (“*2019 TRS Rate Filing*”).²

As discussed below, Hamilton supports the Administrator’s proposed rates for traditional TRS, Captioned Telephone Service (“CTS”), and Speech-to-Speech (“STS”) services, including

¹ *Rolka Loube Associates Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the 2019-2020 Fund Year*, Public Notice, CG Docket Nos. 03-123, 10-51, DA 19-407 (rel. May 13, 2019) (“*Notice*”).

² *See Rolka Loube Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate*, CG Docket Nos. 03-123, 10-51 (filed May 1, 2019) (“*2019 TRS Rate Filing*”).

the proposed additional per-minute amount for STS outreach.³ Hamilton also supports the Administrator’s proposal to incorporate demand for the final two months of the 2018-2019 funding year, which will be paid for during the 2019-2020 funding year, and the proposal for the payment reserve to remain at two average months. Hamilton continues to disagree with the Commission’s reliance on the Administrator’s estimates of IP CTS provider costs because the Administrator significantly understates the costs of providing service by excluding reasonable costs.

The Commission must also continue to ensure that all information entrusted to the Administrator is adequately protected in accordance with both state and federal law, and that the Administrator is providing the Commission with accurate data that correctly reflects providers’ legitimate costs of providing IP CTS and other services.

I. Hamilton Supports the Proposed MARS Rates for Traditional TRS, STS, and CTS

Since 2007, the Commission has used a weighted average of state TRS rates to calculate the MARS compensation rates for interstate traditional TRS and STS as well as a weighted average of state CTS rates to calculate the MARS compensation rates for interstate CTS and IP CTS.⁴ As the GAO noted in its independent report on TRS: “MARS uses an average of competitively bid state rates for intrastate TRS to determine predictable, fair, and reasonable costs of interstate TRS.”⁵ The Administrator appears to have correctly calculated the MARS rates. Hamilton agrees and supports the continued use of MARS for these services.

³ Hamilton does not offer Video Relay Services (“VRS”) or IP Relay service, and therefore is not commenting on the proposed rates for those services.

⁴ See *Telecommunications Relay Services and Speech-to-Speech for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140 (2007).

⁵ GAO Report to the Honorable Jeff Sessions, U.S. Senate, on Telecommunications Relay Service, at 8 (Apr. 2015), <http://www.gao.gov/products/GAO-15-409>.

Hamilton supports the adoption of the Administrator’s proposed MARS-based rate of \$3.1107 per conversation minute for interstate traditional TRS and \$4.2417 for interstate STS.⁶ Similarly, Hamilton supports the Administrator’s proposed rate of \$2.2795 per conversation minute for interstate CTS.⁷ Based on the information available to Hamilton, it appears that the Administrator correctly calculated the rates for these services using the Commission-approved MARS methodology.

II. The Commission Must Sufficiently Compensate IP CTS Providers for Providing IP CTS

The Commission’s rules require the Administrator to “compensate TRS providers for reasonable costs of providing interstate TRS,” using formulas designed to accomplish that requirement.⁸ Given that IP CTS is an approved form of TRS, the Commission therefore must direct the Administrator to compensate IP CTS providers at a rate that, at minimum, represents their reasonable costs of providing the service.

The Commission’s *2018 Interim Rate Order* explains that \$1.58 per minute is the result of two cuts of 10 percent each from the most recent MARS rate.⁹ These arbitrary rate reductions, therefore, have nothing to do with a provider’s reasonable cost of providing the service. Further, to the extent the Commission wishes to claim that a \$1.58 rate approximates IP CTS provider costs, the agency willfully ignores the fact that a provider’s “allowable costs,” which the Administrator has deemed to be “reasonable costs,” do not include actual provider

⁶ *Notice* at 1.

⁷ *Id.* at 1.

⁸ 47 CFR § 64.604(c)(5)(iii)(E)(1) (directing TRS Fund payments to TRS providers based on formulas “designed to compensate TRS providers for reasonable costs of providing interstate TRS” that “appropriately compensate interstate providers for the provision of TRS, whether intrastate or interstate”).

⁹ *Misuse of Internet Protocol (IP) Captioned Telephone Service et al.*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 33 FCC Rcd 5800, 5814-15 ¶ 24 (2018).

costs such as research and development costs beyond those necessary to provide the service, income taxes, and other overhead costs, all of which are permitted Part 32 costs.¹⁰ Indeed, the arbitrary \$1.58 rate ignores the additional costs imposed on providers by the Commission *after* these mandatory rate cuts were adopted, including the costs associated with implementing the TRS User Registration Database.¹¹

Moreover, the Commission has never determined what costs are reasonable or allowable in connection with IP CTS, principally because the rates have been set using MARS since 2007.¹² Without this guidance from the Commission, the Administrator has been collecting IP CTS data using the provider data requests employed for IP Relay and VRS services. IP Relay and VRS have different cost and provision structures, and jamming IP CTS costs into inappropriate cost collection forms has yielded inaccurate results.¹³ At a time when IP CTS providers are facing major technological changes, disallowing research and development costs and legitimate licensing costs does not appear to match the Commission's policy goals for this program.

¹⁰ Comments of Hamilton Relay, Inc., CG Docket Nos. 13-24, 03-123 at 14 (filed Sept. 17, 2018); *see also* 47 C.F.R. § 64.604(c)(5)(iii)(D)(1).

¹¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Further Notice of Proposed Rulemaking, and Order, CG Docket Nos. 13-24, 03-123, FCC 19-11 (rel. Feb. 15, 2019). Hamilton notes that it has filed a Petition for Reconsideration regarding the recovery of exogenous costs imposed by this decision; that petition remains pending. *See* Hamilton Relay, Inc., Petition for Reconsideration, CG Docket Nos. 13-24, 03-123 (filed Apr. 8, 2019).

¹² *See* Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 10-51, at 15 (filed May 24, 2017); *Ex Parte* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, CG Docket Nos. 13-24, 03-123 (May 24, 2018).

¹³ *See 2019 TRS Rate Filing*, at 19-22 (explaining how the Administrator calculates IP CTS provider costs).

Finally, the Commission’s reliance on industry average costs in a market with vastly different market shares risks significantly undercompensating otherwise efficient providers by producing an artificially low industry average. In contrast, when presented with a holistic view of IP CTS provider cost data, the TRS Advisory Council’s Cost Analysis subcommittee determined that “\$1.58 is below *each* of the [non-CaptionCall] Providers Cost Analysis 2019 Projected filing...” even though the 2019 projected costs do not include several actual, but not “allowable” costs.¹⁴

In light of Commission rules requiring reasonable compensation for providing TRS, the \$1.58 interim rate should not be permitted to go into effect, and the Commission should instead grant the previously-filed request for a \$1.75 rate freeze until a permanent IP CTS rate methodology is adopted.¹⁵

III. The Administrator Should Retain a Two-Month Reserve for the TRS Fund

The Administrator has recommended that the TRS Fund include an additional component to protect the TRS Fund from running short of available funds before the end of the TRS Fund year. Specifically, the Administrator recommends a surplus of two month’s projected distributions to providers.¹⁶ Hamilton agrees that this recommendation is a reasonable precautionary measure to guard against the possibility of unanticipated demand for TRS that can unexpectedly increase the need to Fund payments. In addition, Hamilton notes that the Bureau

¹⁴ *Attachment to Ex parte* Letter from Mary Beth O’Hara Osborn, Chief Operating Office, Rolka Loube, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123 (filed Apr. 23, 2019) (emphasis added).

¹⁵ There is a pending Petition for Reconsideration requesting that the Commission reinstate the MARS rate for IP CTS. *See* Sprint Corporation, Petition for Reconsideration, CG Docket Nos. 13-24, 03-123 (filed July 27, 2018). Hamilton is on record supporting this petition, and requests that the Commission act promptly on it. Comments of Hamilton Relay, Inc., CG Docket Nos. 13-24, 03-123 (filed Sept. 7, 2018).

¹⁶ *2019 TRS Rate Filing*, at 37-38.

specifically concluded that a two-month reserve is “reasonable and not excessive.”¹⁷ However, according to the Administrator, the TRS Fund reserve has risen to \$289.1 million as of April 2019,¹⁸ or roughly 76.4 days cash on hand. Given that the Administrator is recommending a two-month reserve, it would appear that the current reserve is approximately \$43.2 million above the two-month reserve, which may alter the contribution factor. In any event, the continuous excess reserves from year-to-year indicate that the TRS Fund is not growing at an unsustainable rate.

IV. Confidential, Competitively-Bid State Data Should Not Be Disclosed in the Record, or Made Available Pursuant to a Protective Order

The Bureau should likewise reject the Administrator’s request “to identify the rates and demand by state, unless the reporting state asserts a claim of confidentiality regarding its compensation rates” or, in the alternative, to “file a confidential version with the Commission which identifies the respective state rates and demand.”¹⁹ Hamilton submits that all state rate and demand information is justifiably nonpublic because it contains sensitive competitive bid information. For this reason, the data should not be disclosed in this docketed proceeding or made available through a protective order. Moreover, various state laws protect commercially-sensitive data, such as the specific rate and performance data referenced by the Administrator, and prohibit its public disclosure under state open records laws.²⁰ The Administrator has

¹⁷ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, CG Docket Nos. 10-51, 03-123, ¶ 19 (CGB 2018).

¹⁸ Interstate TRS Fund Performance Status Report, April 2019, <https://www.rolkaloube.com/wp-content/uploads/2019/05/2019-4-TRSSStatus.pdf>.

¹⁹ *2019 TRS Rate Filing*, at 16.

²⁰ See, e.g., 65 Penn. Stat. Ann. § 67.708(b)(11), (26) (exempting the “financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability” and “trade secret[s] or confidential proprietary information” from Pennsylvania’s Right to Know Law, §§ 101 to 3104); N.Y. Pub. Off. Law (continued)...

provided no rational justification for deviating from those state law requirements. The burden should not be on the states to justify why the information should *not* be released; rather, the burden should be on the Administrator to justify why the information *should be* released notwithstanding state laws to the contrary, and the Administrator has failed to do so. The Commission clearly has the regulatory authority to review the state data without making it a formal part of this docketed proceeding.

§ 87(2)(c)-(d) (permitting an agency to withhold documents from public disclosure and publication under New York’s Freedom of Information Law, if such disclosure “would impair present or imminent contract awards or collective bargaining negotiations” or if the documents “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”); *accord.* New York State, Department of Public Service, “Targeted Accessibility Fund of New York, Inc. Request for Proposal to Provide Telecommunications Relay Service and Captioned Telephone Service in the State of New York” at 6 (July 26, 2012), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B9CB74E0B-1DF4-43DA-997A-6F7FF8D53AE9%7D> (“The actual rates charged by the provider for Conversation Minutes of Use (CMOU) are not contained in the publicly accessible portions of the tariff, but instead are filed with the NYPSC and treated as confidential.”); R.I. Gen. Laws § 38-2-2(4)(B) (exempting “[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature” from Rhode Island’s Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to 38-2-15).

V. Conclusion

For the reasons set forth above, the Commission should adopt the MARS rates as calculated by the Administrator for traditional TRS, CTS, and STS, freeze the compensation rate for IP CTS providers until a new permanent rate methodology is adopted, and permit the Administrator to retain a two-month reserve for the TRS Fund. Finally, the Commission should not permit competitively-sensitive state bid information to be submitted into the public record or made available through a protective order.

Respectfully submitted,

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